

In re) Fair Hearing No. 10,010
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Appeal of)

The petitioner appeals the decision of the Department of Social Welfare to terminate her ANFC benefits based upon her receipt of lump sum income in the form of a personal injury settlement. This matter was heard and an initial recommendation was made at the November 7, 1990 Board meeting.

FINDINGS OF FACT

2. The petitioner was in an automobile accident in 1986. Prior to that time she was the family's principal wage earner but the accident seriously affected her ability to work. Although Medicaid paid for most of her medical expenses (and was reimbursed from the insurance settlement), she had about

\$500.00 in unreimbursed expenses for transportation and child care related to her medical therapy.

3. The petitioner retained an attorney in order to obtain compensation for her injuries. Her attorney was unaware throughout this time period that she was an ANFC recipient. The petitioner was in a neck brace, had her arm in a cast and used a TENS unit for a time after her accident and frequently appeared at the welfare office in that condition. The petitioner believes she may have told the Department that she had obtained a lawyer to recover for her injuries but cannot recall when or to whom she may have given this information, as she has had several different case workers over the year. The Department has no record of such a report and the petitioner's current worker, who has assisted her since, knew that she had some medical problems but did not know that it was the result of an accident. The evidence does not support a finding that the petitioner ever reported that she might receive an injury settlement to the Department or that the Department had reason to know that fact.

4. The petitioner underwent several periodic reviews of her eligibility during her years on ANFC, at which she was instructed to report the receipt of all income to the Department. On February 22, 1990, the petitioner signed a form stating that she understood that "any change in my circumstances that might affect my eligibility for benefits

or the amount of such benefits must be reported immediately (within 10 days) to the Department of Social Welfare. . . ." and specifically that "examples of some things I must report are: . . . receipts of lump sum payment (. . . insurance settlement, etc.)"

5. On August 16, 1990, the petitioner received a lump sum insurance settlement of \$7,023.53 as her share (after Medical and legal expenses were deducted) of her injury compensation award.

6. On August 27, 1990, the petitioner's caseworker received a memo from the Medicaid Department that they had received a settlement on the petitioner's behalf and that she may have received a cash settlement herself. The petitioner's caseworker called her and asked her to come in to review her situation.

7. On August 29, 1990, the petitioner came in and stated that she was expecting to receive over \$7,000.00 but had not received it yet. He caseworker explained the operation of the lump sum rule with regard to her ANFC and her eligibility for other programs when she received that money. The worker advised her again that she had to report the money immediately when she got it and had her sign another "Agreement to Report Change", the same form she had signed in February. The petitioner and the worker discussed a lump sum the petitioner had received some years ago as the result of an inheritance and how that had affected her benefits. Finally they also discussed the possibility of a

Medicaid waiver to get a swimming pool use voucher for a child who needed hydrotherapy.

8. Later that same afternoon of August 29, 1990, the petitioner called back and told her caseworker that she had actually received the money thirteen days earlier and had spent all of it. She stated that she understood that she had to report the money but felt she had ten "working" days to report the change. She did not tell the truth at the interview because she was caught off guard when she was told she would have to live on money she had already spent.

9. After verifying the amount of the award, the Department sent the petitioner a notice on September 4, 1990, closing her ANFC grant of \$613.00 per month due to the receipt of the lump sum of \$7,023.53 until May of 1991. She was advised that the period could be recalculated if the money were spent for certain reasons. Because all of her settlement had been spent, the petitioner was still eligible for Food Stamps, Medicaid and Fuel Assistance.

9. The petitioner presented documentation that she had spent the money on the following:

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|----|---|------------|
| a) | A 24 foot, 4 foot deep above ground pool - 8/16/90 | \$3,600.00 |
| b) | Children's clothing new and used. (various dates in August) | 665.55 |
| c) | Taxes to town - two quarters (current and future) 8/17/90 | 572.70 |
| d) | Lumber, tools and hardware to build a deck and gate. | 522.14 |
| e) | CVPS bill - \$143.00 of which was an arrearage. 9/17/90 | 276.00 |
| f) | Four new tires and mounting | 254.07 |
| g) | Wedding gift | 200.00 |
| h) | Reimbursement for wedding expense | |

	to daughter.	150.00
i)	Groceries	149.98
j)	Johnson & Dix bill - balance of \$293.57 - \$81.00 due per budget plan - 8/17/90	81.00
k)	Pool cover - 9/1/90	78.96
l)	Mortgage to FmHA	72.00
m)	Current credit payments on appliances.	61.00
n)	Community College registration and books for daughter	59.90
o)	Used radio	50.00
p)	Wedding photos - 8/18/90	45.20
q)	Special shoes for daughter	39.00
r)	Non-prescription medicine and medical supplies - 8/17 - 8/31/90	38.90
s)	Current credit payment on lawnmower.	31.00
t)	AVCO finance revolving credit account.	<u>15.83</u>

\$6,963.23

11. As of August 24, 1990, the petitioner's checking account showed a balance of \$17.40.

12. Although the petitioner claims that the \$39.00 shoe purchase was medically required, she put forth no evidence of that fact even though the record was left open for two weeks for her to do so.

13. The expenditures of \$254.07 made for four new tires and mounting was on an automobile which had badly worn tires and is needed to transport members of the household one of whom is disabled, one of whom is recovering from an accident and one of whom has a leg muscle disorder to various doctors and therapies several times per week.

14. The petitioner's teenage daughter suffers from bilateral chronic compartment syndrome in her lower leg. A few months ago she had surgery and she will undergo surgery again in the near future. Both her physicians have recommended that she engage in a program of regular swimming

for her rehabilitation.

15. The petitioner installed a pool with a deck in her backyard with \$4,201.00 of the lump sum she received in order to provide her daughter with a place to swim. Although the pool is heated, it cannot be use for at least six months per year. The petitioner installed the pool without investigating other alternatives for regular swimming. In the petitioner's town there is a year round hotel pool which may be used for \$10.00 per visit, as well as a municipal pool for summer use. In a nearby community is a health club with a year round pool which sells yearly memberships to the public. The petitioner indicated that the municipal pool was too overcrowded for physical therapy, but had not investigated costs or transportation options. She felt the health club might be too expensive or difficult to get to. The petitioner's daughter is currently swimming at the hotel pool on a daily pay basis. The petitioner, who is a Medicaid recipient, has never asked the Department for assistance with swimming expenses for her daughter.

16. The Department represented that upon application it would have, and still will, pay for any physical therapy and transportation to that physical therapy under the Medicaid program if it is found to be medically necessary for the petitioner's daughter.

ORDER

The Department's decision that the petitioner should be disqualified from receiving benefits through May of 1991 due

to countable income of \$7,023.53 is reversed and remanded for calculation of a new disqualification period based on a countable lump sum of \$6,087.56.

REASONS

When an individual receives a lump-sum payment her household becomes ineligible for ANFC for the number of months obtained by dividing the household's monthly "standard of need" (which is set by regulation--see W.A.M. § 2245.2) into the total amount of the lump sum. W.A.M. § 2250.1.

The petitioner essentially makes three claims against the imposition of the disqualification in this matter, 1) that the Department should be estopped from enforcing the lump sum rule against her because of its failure to timely inform her of its effect; 2) that her insurance settlement should not be included as a resource to the extent that it actually compensates her for past expenses; and 3) that the period of disqualification should be reduced because some or all of the money was spent on medical necessities or for other household essentials. Each of these arguments will be considered in turn.

(1) Estoppel

The Board has held in Fair Hearing No. 9273 that estoppel against the Department (a government agency) is an unusual remedy which will only apply when the petitioner has shown that she meets all of the elements for estoppel set

out by the Vermont Supreme Court in Fisher v. Poole, 142 Vt. 162 (1982), and shows that a great injustice will result which outweighs the Department's need to carry out its policies. See Burlington Fire Fighters Association, et al v. City of Burlington, 149 Vt. 293 (1988).

The elements of estoppel must be established by the person invoking the doctrine and require:

First, the party to be estopped must know the facts; second, the party being estopped must intend that his conduct shall be acted upon or the acts must be such that the party asserting the estoppel has a right to believe it is so intended; third, the latter must be ignorant of the true facts; and finally, the party asserting the estoppel must rely on the conduct of the party to be estopped to his detriment. Fisher, supra at 168.

The evidence shows that the party to be estopped, the Department, did not know the true facts here because the petitioner never notified it of her receipt of the lump sum.

The petitioner's argument that the Department has constructive notice that she would be getting a personal injury settlement because they were aware of her physical condition is unpersuasive. Even had the Department's worker realized that her injuries were the result of an accident, there is no reason for her to have known that the petitioner's injuries were caused by another person who had insurance which would be paid out in the form of a settlement in the near future.

It is the petitioner's obligation to inform the Department of any change of circumstances immediately which

is defined by "the regulations" as within ten days. W.A.M.

§ 2220. The petitioner knew or should have known based upon information given her many times and agreements signed by her, that she was to report any change and, specifically, the receipt of a lump sum insurance payment, immediately upon receipt. See also W.A.M. § 2250.1. It appears that the petitioner understood this obligation although she made no attempt to report the receipt of the settlement until it was discovered by the Department some thirteen days later.¹

Without the petitioner's report, there is no way the Department could have known the facts of her situation and given her any instructions thereon. It must be concluded, therefore, that the petitioner has failed to meet even step one of the estoppel argument. In addition, as estoppel is an equitable remedy which requires the person invoking it to have "clean hands", the Board has generally not allowed its invocation where the petitioner has initially failed in her obligation under the regulations.

(2) Compensation for Past Losses

The Department's regulations include in the definition of "lump sum income":

Lump sum payments, including windfall payments, shall be counted as income unless excluded under an exception cited below. Lump sum payments, including windfall payments, which have been set aside in a trust fund and which are excluded in accordance with ANFC policy relating to "Trust Funds" shall not be counted as income.

Additional exceptions to the above regulation are:

. . .

- 2) Insurance payments or similar third party payments, if received for payment of medical bills or funeral costs and used for those purposes, must be excluded. Also excluded would be a home owner's insurance payment (e.g., for a house which burned down) if it is used to rebuild or repair the house or purchase a new one.

. . .

W.A.M. § 2250.1²

The petitioner argues that approximately \$500.00 of her personal injury award is to compensate her for expenses associated with her physical therapy (transportation and child care) which were not covered by Medicaid. The petitioner did not keep receipts because she did not realize she would need them later, but her allegations, considering the extent of her injuries, are entirely credible. Therefore, \$500.00 of the \$7,023.53 settlement should be excluded because it is in reimbursement for her for medically related bills which she presumably had to pay from her ANFC grant.

The petitioner's request to exclude amounts which she has or may have to spend to replace flood damaged assets are not deductible from an unrelated personal injury settlement.

If she gets a flood insurance settlement (which she is pursuing), she may deduct amounts used to replace lost items from that settlement.

(3) Recalculation of Ineligibility Period

The regulations give some relief from the harsh disqualification of the lump sum rule as follows:

The period of ineligibility due to a lump sum benefit may be recalculated if:

1. An event occurs which, had the family been receiving assistance, would have changed the amount paid.
2. The income received has become unavailable to the family for circumstances beyond its control. Such circumstances include, but are not limited to, death or incapacity of the principle wage earner, or the loss of shelter due to fire or flood.
3. The family incurs and pays for medical expenses which offset the lump sum income.

W.A.M. § 2250.1

The petitioner first claims that she and her family have incurred and paid for a medical expense--the purchase of a swimming pool for a child with a disease of the leg--which should be offset from the lump sum. The petitioner's daughter's physicians have prescribed that she become involved in a swimming program to aid in her rehabilitation.

For purposes of this appeal the necessity of the therapy is not in question. However, the necessity of the means used to provide that therapy is very much in question. The petitioner did not apply to Medicaid for help, or investigate obtaining a health club membership or other right to use a year-round pool. Without looking at any alternatives, she used a considerable chunk of her own

scarce funds to put in a pool which cannot even be used for over half of the year. She has still been forced to pay for an indoor pool in the winter. As there were potentially many other less expensive and more comprehensive ways to provide a swimming program for her daughter which were totally unexplored, it cannot be found that the over \$4,000.00 spent by the petitioner on the pool, deck and accessories was a necessary means of providing therapy and therefore a bona fide deductible medical expense. However, it can be found that amounts paid for drugs and band-aids and the like for family use were medical expenses which can offset the lump sum in the amount of \$38.90.

Finally, the petitioner asks that her lump sum income be offset because it has become unavailable to the family for circumstances beyond its control, citing the strain on her family finances due to her incapacity and the family's loss of several items in a flood, including their furnace which will have to be replaced. However, the petitioner points to no specific expenditures (other than the replacement of a lawnmower) which are a result of these conditions.

To exclude income under this section, it must have been spent for items necessary for the health and well-being of the family and must be out of the usual course of monthly expenditures expected of a family in these circumstances. Thus, car repair expenses have been deducted when a family can show that a car is necessary for their transportation to

work, shopping or medical expenses (See Fair Hearings No. 9629, 9273), and payments made on past due bills have been deducted when it shows that it is necessary to avoid eviction or the cut-off of essential utilities such as heat and electricity. (See Fair Hearing No. 9458)

The petitioner bought four new tires for her car which car is essential for the transportation of her family to doctor's appointments and physical therapy (including swimming arenas!). Therefore, that amount should be excluded as being necessary to the family's health and well-being. She did pay a \$143.00 arrearage on her electric bill which, it is reasonable to conclude, would have resulted in a shut-off without its payment. The petitioner can get an offset for that amount. Other expenses reported by the petitioner were either ordinary non-deductible living expenses, such as food, clothing, utilities, mortgage and taxes, debt installment loans, or non-essential expenses such as wedding gifts, a radio, lawnmower, photographs, and college books. It cannot be found that any of these latter expenditures were made for reasons beyond the family's control.

CONCLUSION

The Department's decision that the petitioner's personal injury insurance payment settlement is generally subject to the lump sum disqualification rule is correct. However, \$935.97 of the \$7,023.53 actually received should

be deducted from the sum to show amounts used to cover unreimbursed medically-related expenses connected with the injury, (\$500.00), as well as other medical expenses incurred (\$38.90), and money laid out to provide needed transportation (\$254.07) and avoid termination of her electricity (\$143.00).

FOOTNOTES

¹These findings are not and should not be construed as a finding that the petitioner intentionally failed to report the income. The facts indicate that she may have negligently failed in this regard.

²Although funds received as personal injury compensation may arguably not be a "windfall" as this term is commonly understood, it is specifically included in the definition of lump sum payments in the federal regulations.

45 C.F.R. § 223.20(a)(3)(ii)(F). The Department of Health and Human Services' definition of "windfall" in its regulation has been upheld by the U.S. Supreme Court. See Lukhard v. Reed, 481 U.S. 368, 107 S.Ct. 1807 (1987).

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